UNITED NATIONS

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/796
21 November 1996

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 796

Cases No. 883: XU
No. 888: YUAN
No. 889: LIN
No. 890: LI
No. 891: YIN
No. 892: SHEN
No. 907: JIA
No. 911: PEI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Hubert Thierry, Vice-President, presiding; Mr. Francis Spain; Ms. Deborah Taylor Ashford;

Whereas, on 31 October 1995, Jin Xu, a former staff member of the United Nations, filed an application containing, inter alia, the following pleas, which were also contained in the applications filed on the same day by the Applicants Yuan, Lin, Li, Yin and Shen, and in the applications filed later by Jia and Pei:

"(a) That the recommendation of the JAB to waive the time-limits [specified in staff rule 111.2(a) for making requests for administrative review] is well-founded and that the Secretary-General thus should be required to accept the recommendation;
(b) That the Applicant should be considered for a career appointment;
(c) That, should the Secretary-General decide not to grant him a career appointment the Applicant should, in lieu of that appointment, be paid three years' net base salary."

The Applicant Xu's application contained the following additional plea:

"(d) That, in the alternative, the Tribunal should require that the Organization facilitate his reinstatement in the United Nations or a specialized agency, as was recommended in the 'Han' case (Administrative Tribunal Judgement No. 527, para. XIX) as soon as possible."

Whereas the Respondent filed his answer on 10 June 1996;

Whereas the Applicant Xu filed written observations on 20 September 1996;

Whereas, on 31 October 1995, Dexin Yuan, a former staff member of the United Nations, filed an application containing the pleas cited above and the following additional plea:

"(d) Require that the Applicant be compensated for the period in which he was not employed by the UN, and thereafter for the difference between the compensation that he has earned, and that he would have earned had he been considered for career appointment in December 1989."

Whereas the Respondent filed his answer on 25 June 1996;

Whereas the Applicant Yuan filed written observations on 20 September 1996;

Whereas, on 31 October 1995, Xiao-jia Lin, a staff member of the United Nations, filed an application containing the pleas cited above and the following additional plea:

"(d) That, in the alternative, the Tribunal should require that the Applicant be compensated for the period in which she was not employed by the UN, and thereafter for the difference between the compensation that she has earned, and that she would have earned had she been considered for career appointment in June 1989."

Whereas the Respondent filed his answer on 28 June 1996;

Whereas the Applicant Lin filed written observations on 20 September 1996;

Whereas, on 31 October 1995, Ning Li, a former staff member of the United Nations, filed an application containing the pleas cited above and the following additional pleas:

> "(b) That the JAB was incorrect in finding that the secondment of the Applicant was valid, since his association with the Chinese Foreign Ministry was only pending his appointment to the UN, and since the Applicant had sent a letter to the Chinese mission to ensure that even the appearance of secondment would not continue after June 1989: thus there was no genuine secondment from the Government at the time the Applicant should have been considered for a career appointment;
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> ...
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> (e) That, in the alternative, the Tribunal should require that the Applicant be compensated for the period in which he was not employed by the UN, and thereafter for the difference between the compensation that he has earned, and that he would have earned had he been considered for career appointment in August 1989;
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> (f) That, in the alternative, the Tribunal should require that the Applicant be compensated for at least the one year recommended by the JAB."

Whereas the Respondent filed his answer on 12 August 1996;

Whereas the Applicant Li filed written observations on 20 September 1996;

Whereas, on 31 October 1995, Xiaoning Yin, a staff member of the United Nations, filed an application containing the pleas cited above and the following additional plea:

> "(d) That, in the alternative, the Tribunal should require that the Applicant be compensated for the period in which he was not employed by the UN, and thereafter for the difference between the compensation that he has earned, and that he would have earned had he been considered for career appointment in December 1989."

Whereas the Respondent filed his answer on 8 August 1996;

Whereas the Applicant Yin filed written observations on 20 September 1996;

Whereas, on 31 October 1995, Guan-rong Shen, a former staff member of the United Nations, filed an application containing the pleas cited above and the following additional plea:

> "(d) That, in the alternative, the Tribunal should require that the Applicant be compensated for the period in which he was not employed by the UN, and thereafter for the difference between the compensation that he has earned, and that he would have earned had he been considered for career appointment in August 1989."

Whereas the Respondent filed his answer on 3 July 1996;

Whereas the Applicant Shen filed written observations on 20 September 1996;

Whereas, on 31 January 1996, Yunqi Jia, a staff member of the United Nations, filed an application containing the pleas cited above and the following additional plea:

> "(d) That, in the alternative, the Tribunal should require that the Applicant be compensated for the period in which he was not employed by the UN, and thereafter for the difference between the compensation that he has earned, and that he would have earned had he been considered for career appointment in December 1989."

Whereas the Respondent filed his answer on 5 August 1996;

Whereas the Applicant Jia filed written observations on 20 September 1996;

Whereas, on 31 January 1996, Shu Pei, a former staff member of the United Nations, filed an application containing the pleas cited above and the following additional plea:

"(d) That, in the alternative, the Tribunal should require that the Applicant be compensated for the period in which he was not employed by the UN, and thereafter for the difference between the compensation that he has earned, and that he would have earned had he been considered for career appointment in December 1989."

Whereas the Respondent filed his answer on 18 June 1996;

Whereas the Applicant Pei filed written observations on 20 September 1996;

Whereas the facts in all the cases are as follows:

The Applicant Xu entered the service of the Organization on 25 January 1985, on a five-year fixed-term appointment as an Associate Translator at the P-2, step I level. His Letter of Appointment carries the notation: "On secondment from the Government of China".

He was separated on 24 January 1990, the expiration date of his fixed-term appointment. Thereafter, he was employed on a series of short-term appointments of varying duration from 23 September 1991 through 13 May 1995.

The Applicant Yuan entered the service of the Organization on 21 May 1984, on a five-year fixed-term appointment as an Associate Translator at the P-2, step IV level. His Letter of Appointment does not carry a notation stating that he was on secondment from the Government of China.

He was separated on 20 May 1989, the expiration date of his fixed-term appointment. Thereafter, he was employed on a series of short-term appointments of varying duration from 12 August 1991 through 31 August 1996.

The Applicant Lin entered the service of the Organization on 19 June 1984, on a five-year fixed-term appointment as an Associate

Translator at the P-2, step I level. Her Letter of Appointment carries the notation: "On secondment from the Government of China".

She was separated on 18 June 1989, the expiration date of her fixed-term appointment. Thereafter, she was employed on a series of short-term appointments of varying duration from 28 October 1991 through 28 January 1997.

The Applicant Li served on short-term appointments at the Economic and Social Commission for Asia and the Pacific (ESCAP) in 1983 and 1984. On 31 August 1984, the Applicant was granted a five-year fixed-term appointment as an Associate Translator in ESCAP at the P-2, step I level. His Letter of Appointment does not contain any mention of secondment. However, the Personnel Action issued at that time carries the notation: "Staff member on secondment from the P.R.C. [People's Republic of China] Govt."

He was separated on 30 August 1989, the expiration date of his fixed-term appointment. Since his separation, he has served the Organization on a series of short-term appointments of varying duration from 21 May 1992 through 10 September 1993.

The Applicant Yin entered the service of the Organization on 24 July 1984, on a five-year fixed-term appointment as an Associate Translator at the P-2, step IV level. His Letter of Appointment carries the notation: "On secondment from the Government of China".

His appointment was extended for five months and six days, and he was separated at its expiration on 29 December 1989. Thereafter, he was employed on a series of short-term appointments of varying duration from 23 August 1991 through 1 February 1994. On 23 April 1994, the Applicant Yin received a fixed-term appointment through 31 December 1995, which was extended through 31 December 1996.

The Applicant Shen entered the service of the Organization on 7 August 1984, on a five-year fixed-term appointment as an Associate Interpreter at the P-2, step I level. His Letter of Appointment carries the notation: "On secondment from the Government of China".

He was separated on 6 August 1989, the expiration date of his appointment. Thereafter, he has worked freelance for the Interpretation Service on a series of WAE (When Actually Employed) and short-term contracts of varying duration from 12 January 1994 through 8 November 1996.

The Applicant Jia entered the service of the Organization on 24 July 1984, on a five-year fixed-term appointment as an Associate Translator at the P-2, step IV level. His Letter of Appointment carries the notation: "On secondment from the Government of China".

On 24 July 1989, the Applicant's appointment was extended for five months and six days and he was separated on 29 December 1989. Thereafter, he was employed on a series of short-term appointments of varying duration from 23 September 1991 through 30 September 1994. The Applicant was reemployed on 1 June 1995, on a two-year fixed-term appointment as a Terminologist, Chinese Language Service.

The Applicant Pei entered the service of the Organization on 21 May 1984, on a five-year fixed-term appointment as an Associate Translator at the P-2, step IV level. His Letter of Appointment does not contain any mention of secondment.

He was separated on 20 May 1989, the expiration date of his fixed-term appointment. Thereafter, he was employed on a series of short-term appointments of varying duration from 23 September 1991 through 24 December 1996.

On 20 September 1990, ten former Chinese language staff members, including the Applicants, wrote to the Secretary-General, alleging denial of due process and requesting reinstatement. By a

letter dated 7 November 1990, the Assistant Secretary-General for Human Resources Management informed the Applicants that their "allegations and complaints" were not receivable because they were time-barred.

On 4, 5 and 20 March 1991 respectively, the Applicants Xu, Yuan and Yin lodged appeals with the Joint Appeals Board (JAB). The Applicants Lin and Li lodged appeals with the JAB on 28 October and the Applicant Shen lodged an appeal on 30 October 1991. The Applicants Jia and Pei lodged appeals with the JAB on 30 May and 8 October 1991, respectively.

The JAB adopted its reports in respect of the Applicants Xu, Yuan, Yin, Jia and Pei on 6 December 1991 and in respect of the Applicants Lin, Li and Shen on 8 May 1992. Its considerations and recommendations in each of these cases read as follows:

> "Considerations
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> 10. ... The Panel felt that the text of staff rule 111.2(e) gave it the discretion to waive any of the time-limits specified in paragraphs (a) and (b) of the Rule, including that specified for the request to the Secretary-General for an administrative review. This was also the position of the UNAT [United Nations Administrative Tribunal] in Judgement Nos. 260 and 215 (Denis), in particular paragraphs XV, XVI and XXIV through XXX of the latter, as well as in XIII of Judgement No. 527 (Han). The Panel concluded, therefore, that if it were to consider that there were the 'exceptional circumstances' required in staff rule 111.2(e), it could waive the time-limit set for the request to the Secretary-General, as well as that set for an appeal to the JAB itself.
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> 11. The Panel had no doubt that Respondent is correct in arguing that the decision by the Secretary-General to strictly enforce the time-limit in this case was properly made and, therefore, should not lightly be set aside. The Panel noted that Respondent acknowledges (...) that the 'staff thought to be on secondment constituted a group by which by definition, was in an exceptional situation', while arguing that Appellant's situation was not exceptional within that group. No doubt, Applicants Qiu, Zhou and Yao (Judgement No. 482) met the time-limits; they were well advised to do so. Appellant, and a number of others

separated from the Organization prior to the date of UNAT Judgement No. 482, did not. The Panel is well aware of the dictum: 'Ignorance of the law is no excuse'; it is also familiar with the concepts 'rule of law' and of 'due process'. The Panel is prepared to accept that Appellant was less familiar with these legal norms, and that it would be reasonable to expect that Appellant would only proceed with the appeal process when he was aware that he had probable cause of action. The Panel notes, in this connection, that the Secretary-General was in a similar state of ignorance, as reflected in the remark in paragraph 27 of Respondent's statement: 'For years, the Organization, in good faith, had worked on the assumption that a great number of its staff were on valid secondment from their Government and acted accordingly.' Respondent goes on to say that UNAT Judgement No. 482 created a problem of considerable dimensions for the Secretary-General. The Panel, therefore, concludes that the circumstances so described were exceptional and that it would be justified in waiving the time-limit.

12. The Panel observes, however, that Appellant acted promptly once he was aware that he did, indeed, have a probable cause of action. The Panel was informed that Tribunal judgements are not given general distribution, and that UNAT Judgement No. 482 was put in limited distribution at Headquarters on 9 August 1990. Appellant could not reasonably be expected to have been informed of the judgement until some time after that date. The letter to the Secretary-General signed by Appellant and nine others was dated 20 September 1990 and was received in OHRM [Office of Human Resources Management] on 5 October 1990, within the established time-limit for requests for administrative review.

13. The Panel then addressed the matter of the time-limit specified in staff rule 111.2(a)(i). It was aware that Panels of the JAB had not always felt bound to take a narrow view of this provision, but tended to consider whether, in the circumstances of a given case under review, equity would be better served by avoiding a strict application of the time-limit. They had, therefore, on a number of occasions waived the time-limit in cases they viewed as exceptional. The Panel noted that the letter of 7 November 1990 to Appellant from the ASG/OHRM was couched in terms which might lead Appellant to conclude that the appeal time-limit was not a separate matter at issue. The Panel was struck by the failure of the letter to notify Appellant, as is the normal practice in such letters, of his right to appeal and of the relevant rules and time-limits. By the time (January 1991)

Appellant was able to avail himself of counsel who might have advised him otherwise, the time-limit had passed. Moreover, the Administrative Tribunal, in Judgement No. 527 (Han), having decided to reject Applicant's pleas, nevertheless noted (para. XIX) the 'exceptional circumstances of the case' and its similarity to that of Applicants Qiu, Zhou and Yao and made a strong recommendation in favour of Applicant Han. The Panel feels justified in following the lead of the Tribunal in this case. It decided, therefore, that the appeal was receivable and proceeded to consider it on its merits.

14. The Panel, having taken note of paragraph 4 of Respondent's brief, considered that the memorandum of 24 January 1992 from the Secretary, JAB, to the Chief, Administrative Review Unit (ARU), was an accurate summary of the rights and responsibilities of the parties and of the Panel as defined in the Staff Rules and the Rules of Procedure and Guidelines of the Joint Appeals Board at Headquarters. The Panel had no doubt that it had the absolute right under the rules to consider the appeal solely on the material before it. It felt it advisable explicitly to state herein its conviction that it was justified in doing so.

15. The Panel noted that Respondent made no comment or objection to Appellant's statement of facts. The facts are, therefore, not in dispute. Given Appellant's PERs and his current UN employment, neither is his competence. The fact that another person proposed by the Chinese government was recruited to the post he vacated establishes that a post was available against which he could have been extended or given a career appointment. Appellant was not reviewed at all for a career appointment much less given the careful consideration called for the General Assembly resolution 37/126 and 38/232. Nor was he, as an admittedly qualified serving staff member, accorded the 'fullest regard' called for in staff regulation 4.4. In every respect but one, Appellant's situation was precisely that of Applicants Qiu, Zhou and Yao. They were recommended for career appointments by their immediate supervisor, he was not. Consistent with UNAT Judgement No. 482, in particular paragraph XLI, the Panel concluded that the difference is not significant.

Recommendations

16. The Panel recommends that:

(a) Appellant be granted a career appointment as from [25 January 1990], and be paid salary and allowances retroactive to that date, less whatever he may have received as a short-term appointee; and

(b) Appellant be paid three years' net base salary, should the Secretary-General decide not to grant him a career appointment.

17. The Panel makes no other recommendation with respect to this appeal."

On 20 and 28 January and 4 June 1992, the Secretary-General transmitted a copy of the JAB report to the Applicants and informed them as follows:

"The Secretary-General has re-examined your case in the light of the Board's report. He has decided not to accept its recommendations.

The Secretary-General's decision is based on the following considerations:

(a) That there can be no question that the contested decision was taken in accordance with the policy established by the Secretary-General for the application of Judgement No. 482 to similarly situated staff;

(b) That this policy was fully justified. A great number of serving staff were directly affected by Judgement No. 482 thus creating a problem of considerable budgetary and human dimensions. The policy in question was designed to provide a general solution which could apply fairly to similarly situated staff and could be effectively implemented. While it would have been possible to limit the application of the new policy to staff members in service at the time Judgement 482 was rendered, the Secretary-General opted for a wider application. Some time-limit had to be established since it was obviously impossible to give consideration for employment and provide a post to the hundreds of former staff members previously thought to have been on valid secondment who had, in most cases, returned to Government service. The only time-limit which could not be seen as arbitrary, and which would take into account the rights of the individuals involved as well as the limited number of available posts, was to use as a cut-off date the time-limit provided by the Staff Rules themselves;

(c) That procedures used in good faith for years by the Secretary-General cannot now be retroactively assessed and found invalid when no timely appeal was filed;

(d) that the Board committed a violation of due process in proceeding to the merits of the appeal without giving the Respondent the chance to comment on your allegations; [This paragraph only in the letters to Applicants Xu, Yuan, Yin, Jia and Pei.]

(e) That resolution 37/126 does not establish a right to a career appointment irrespective of whether there is an available post or whether the former staff member's services are needed. In this connection it should be noted that there are far too few available posts to re-employ all former staff who were separated at the expiration of their fixed term appointments. ..."

On 31 October 1995 and 31 January 1996, the Applicants filed with the Tribunal the applications referred to earlier.

Whereas the Applicants' principal contentions are:

1. Due to the exceptional circumstances, the time-limit for requesting review of the decision to let the Applicants' fixed-term appointments expire after five years of service, without consideration for a career appointment, should have been waived by the Secretary-General, in the exercise of his discretion.

2. If the waiver of the above-referenced time-limit is granted, the Applicants should be given consideration for career appointments in the Organization or one of its agencies.

Whereas the Respondent's principal contentions are:

1. Staff rule 111.2(a) specifies time-limits for lodging appeals against administrative decisions.

2. The Applicants' request for a review of the contested decisions did not respect the applicable time-limit.

3. The Secretary-General's decision to apply the time-limit was a reasonable exercise of his discretion.

4. The Applicants have now been given every reasonable consideration for career appointments.

5. The Secretary-General is not obliged to accept recommendations of the JAB.

The Tribunal, having deliberated from 21 October to 21 November 1996, now pronounces the following judgement:

I. The issue before the Tribunal is whether the Respondent properly exercised his discretion in finding the Applicants' appeals time-barred. As the facts and law with respect to this issue are the same in each of the Applicant's appeals, the Tribunal joins the applications and decides them in this one judgement.

II. The Applicants, all nationals of the People's Republic of China at the time of their appointment, separated from UN service prior to Judgement No. 482, Qiu, Zhou and Yao, rendered on 25 May 1990. When the Applicants, all but two of whom had been on secondment from the Government of the People's Republic of China, became aware of this Judgement, they submitted a request for review of the decision to let their fixed-term appointments expire after five years of service, without consideration for a career appointment. This request for review was submitted on 20 September 1990. On 7 November 1990, the Applicants were informed by the Respondent that the request was time-barred. The Joint Appeals Board (JAB) waived the time bar and considered the substantive merits of the applications. The Secretary-General, on the basis of the time bar, rejected the JAB's recommendations.

III. Judgement No. 482, relating to the validity of secondment practices, affected a large number of staff members whose terms of employment, in accordance with the Judgement, did not comply with

the conditions set forth therein for valid secondment. Yet previously, these staff members had been thought by the Respondent to be on valid secondment. Consequently, their governments had played a role in decisions relating to their continued employment with the United Nations. Following Judgement No. 482, with regard to staff members not validly on secondment, decisions relating to continued employment had to be made independently by the Respondent.

IV. In response to Judgement No. 482, the Respondent established a Joint Review Group to ensure that staff previously thought to be on secondment received reasonable consideration for career appointment. However, with regard to staff members who had separated from service, the Respondent included in this review only those who had submitted requests for review within the two-month period set forth in staff rule 111.2(a). All of the Applicants had separated from service more than two months prior to Judgement No. 482, but unlike the applicants in that Judgement, none of them had initiated appeal proceedings relating to their separation prior to Judgement No. 482. In fact, the Applicant Xu separated on 24 January 1990, the Applicant Yuan separated on 20 May 1989, the Applicant Lin separated on 18 June 1989, the Applicant Li separated on 30 August 1989, the Applicant Yin separated on 29 December 1989, the Applicant Shen separated on 6 August 1989, the Applicant Jia separated on 29 December 1989, and the Applicant Pei separated on 20 May 1989. The initiation of their proceedings in September 1990 was a direct result of Judgement No. 482 itself, which led the Applicants to believe that procedures for the administration of justice within the United Nations might provide an effective avenue of recourse for them.

V. Staff rule 111.2(e) provides that "an appeal shall not be receivable unless the time-limits specified in paragraph (a) or (b) above have been met or have been waived, in exceptional

circumstances, by the panel constituted for the appeal". In accordance with this rule, the JAB has the authority to waive the time-limits in "exceptional circumstances" and consider an appeal on its merits, as it did, in the case of the Applicants. However, in this case, the Secretary-General did not agree with or accept the JAB's finding that exceptional circumstances justified a waiver of the time-limits.

VI. The exceptional circumstances identified by the JAB are general circumstances relating to secondment, rather than individual circumstances relating particularly to the Applicants. The JAB was prepared to accept that "it would be reasonable to expect that the [Applicants] would only proceed with the appeal process [when they] were aware that [they] had a probable cause of action". The Applicants' claims are, in essence, that the appeal process was futile prior to Judgement 482. Yet Judgement No. 482 itself belies this assertion.

VII. The jurisprudence of the Tribunal demonstrates that "any circumstances beyond the control of the Applicant which prevented the staff member from submitting a request for review and filing of an appeal in time may be deemed exceptional circumstances." (Judgements No. 372, Kayigamba (1986) and No. 713, Piquilloud (1995)). The rendering of a subsequent judgement cannot be deemed exceptional circumstances in accordance with this logic. The JAB correctly noted that the Applicants Qiu, Zhou and Yao met the time-limits set forth in the rules, as did a number of other former staff members who had initiated proceedings following their separation and prior to Judgement No. 482.

VIII. By necessity, the scope of Tribunal judgements relating to matters of broad application beyond particular applicants is primarily prospective in nature. In effect, the Applicants seek

retroactive implementation of Judgement 482, and the Respondent rightly points out that any time-limit other than that set forth in the staff rules would be arbitrary. The Tribunal considers that the time-limit set by the Respondent in his response to Judgement No. 482 was a reasonable exercise of discretion and has so held in Judgement No. 527, Han (1991). In that case, too, the applicant's appeal was apparently motivated by Judgement No. 482.

IX. The establishment of a reasonable time-limit for the implementation of Judgement 482 does not preclude the presence of exceptional circumstances justifying a waiver of the time-limit, as the Tribunal held in Judgement No. 713, Piquilloud (1995). In that case, however, the Applicant had already initiated efforts to pursue legal recourse following her separation from service and prior to Judgement No. 482. Moreover, she was hindered by the negligence of her counsel under circumstances that were beyond her control. The Tribunal held, in this regard, that "she was prevented from presenting her request in a timely manner ..., partly because of the negligence of her counsel ..." (cf. paragraph IV). The Tribunal's holding in Piquilloud was based on the Respondent's failure even to consider whether the particular circumstances of the applicant might be exceptional and justify a waiver of the time bar. There is no evidence in the cases presently before the Tribunal to suggest that the Applicants were prevented from filing appeals in time by anything other than failing to comply with staff rule 111.2 (a).

X. The Applicants also contend that they did not appeal because of their having been influenced by their supervisors and other members of the Administration who advised them of the futility of an appeal. As in Han, "the Tribunal can only hope that the supervisor in question will make every effort to facilitate the Applicant's reinstatement in the international civil service." (Paragraph XVII). In this regard, the Tribunal notes that some of the Applicants have

been reappointed on a fixed-term basis and that all of the Applicants have served on short-term appointments since their separation. The Tribunal particularly encourages this effort by the Respondent to address the difficult situation of the Applicants, in the light of their failure to avail themselves of the legal recourse which was available to other staff members who were still in service or had already filed timely appeals when Judgement No. 482 was rendered.

XI. For the foregoing reasons, the Tribunal rejects the applications in their entirety.

(Signatures)

Hubert THIERRY
Vice-President, presiding

Francis SPAIN
Member

Deborah Taylor ASHFORD
Member

New York, 21 November 1996

R. Maria VICIEN-MILBURN
Executive Secretary